but he has done so under this condition, that the claim for the casualty cannot be enforced against him sooner than it could have been enforced against him under the law prior to the statute. It was said that there is an irritancy in the feu-contract which is effectual to enable the superior to enforce the stipulation in question. I cannot agree with that view. The only irritancy is in the precept of sasine, and its only effect is that the instrument of sasine following upon that precept is to be bad if it does not contain every particular that is set out in the precept. That can have no operation against a singular successor who might obtain infeftment upon the vassal's precept, to which no objection could be taken. The assumption of the whole case is that the title is in order.

The LORD PRESIDENT concurred.

The Court answered the question in the negative.

Counsel for the First Party—C. N. Johnston—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second Party—Craigie. Agents—Alexander Morison & Company, W.S.

Thursday, January 30.

SECOND DIVISION.

[Sheriff of Orkney.

MAXWELL *v.* HORWOOD'S TRUSTEES.

Sheriff—Jurisdiction—Contract—Lease—Defenders resident outwith sheriffdom and not personally cited within it.

Held that a sheriff has no jurisdiction *ratione contractus* over a defender who is not resident in the sheriffdom unless he has been cited personally within the sheriffdom; and that this rule applies even where the contract relates to the tenancy of heritage belonging to the defender which is situated within the sheriffdom.

Ownership of heritage situated within a sheriffdom does not by itself confer jurisdiction upon the sheriff over the owner.

Thomas Maxwell, farmer, Swanbister, in the parish of Orphir and county of Orkney, brought an action in the Sheriff Court of Orkney at Kirkwall against the Reverend Faulknor Russell Horwood, Vicar of Aldernaston, near Reading, in the County of Berkshire, and John Patrick Wright, W.S., Edinburgh, the trustees acting under the antenuptial contract of marriage between the late Colonel Horwood of Scar House, Sanday, Orkney, and Mrs Jane Hughes or Horwood, presently residing at Scar House aforesaid, and as such trustees proprietors of the farm of Howe in the Island of Sanday.

The pursuer craved decree for payment of the sum of £204, 2s. 11d., which he claimed as being due by the defenders in respect of their obligations as landlords to him as tenant of the said farm of Howe. The pursuer had been tenant of that farm, first under a lease for nineteen years from Martinmas 1879 entered into between him and the marriage-contract trustees, and after its expiry by tacit relocation until Martinmas 1899, when he quitted possession of the farm.

Warrant of citation was granted in the present action upon 12th December 1900. Neither of the defenders was resident in the Sheriffdom of Caithness, Orkney, and Shetland, and neither of them was personally cited within the sheriffdom.

The defenders entered appearance and lodged defences.

They pleaded, *inter alia*—"(1) No jurisdiction."

By interlocutor dated 17th June 1901 the Sheriff-Substitute (COSENS) sustained the first plea-in-law for the defenders and dismissed the action.

Note...—"The defenders plead, *inter alia*. 'No jurisdiction.' I think that the pursuer, in his petition, or at least at the adjustment, after the defenders had raised the plea of no jurisdiction, should have averred his reasons for bringing this action into this Court, and mentioned his grounds for maintaining this Court had jurisdiction. See *Goodall* v. *Robb*, 26th Nov. 1900 (Perthshire), 17 Sh. Ct. Rep. 162, and remarks by Sheriff Jameson, p. 164.

"I have found nothing in the record to indicate the pursuer's reasons. I endeavoured to ascertain at the debate on the plea of no jurisdiction what he relied on as founding jurisdiction. From his argument, I understood him to contend—(1) that the defender had heritable property in the county; (2) that it was a question relating to heritable right or title; and (3) that there was jurisdiction *ratione contractus*.

"The first and second of these arguments I think can be shortly disposed of. It appears to me that it has been clearly decided that the mere possession of heritable property in a county does not of itself found jurisdiction there, personal service being necessary. See *M'Bey* v. *Knight*, 22nd Nov. 1879, 7 R. 255, where Lord Gifford says, at p. 258—'Mere proprietorship of heritable subjects has never been held to subject the owner to the jurisdiction of a Sheriff, he not being personally cited within the county, and possibly never having been within Scotland in his life. It is in this sense that the Supreme Court is the *commune forum* of all persons residing abroad and who must be edictally cited as such.'

"The second argument also appears to present no difficulty.

"I have already indicated the nature of the action, and it is clearly not one of 'heritable right or title' in terms of sec. 8 of the Sheriff-Court Act of 1877, 40 and 41 Vict., cap. 50. I have carefully considered the cases of *Mouat* v. *Lee*, 6th June 1891, 18 R. 876; *Thomson* v. *Wilson's Trustees*, 5th July 1895, 22 R. 866; *Commissioners of Pollokshaws* v. *M'Lean*, 17th November

1899, 2 Fraser 96; and *Starke's Trustees* v. *Cooper's Trustees*, 20th July 1900, 2 Fraser 1257, and none of these cases appear to be applicable here. I have also read the case of *The Culross Special Water Supply District Committee* v. *Smith Sligo and Others*, November 6, 1891, 19 R. 58, and I find in the already quoted case of the *Commissioners of Pollokshaws* v. *M'Lean* it was distinguished by the Judges of the First Division from *M'Bey* v. *Knight*, 7 R. 255, *supra*. Lord M'Laren remarks in the case of the *Commissioners of Pollokshaws*, 2 F. 99—'Now, I think to argue from the judgment in *Smith Sligo's* case that the Sheriff has universal jurisdiction *ratione rei sitæ* is an example of unsound induction from an isolated case. In our judgment we do not consider any case except that of disputed possession, and the authority of the case of *M'Bey* v. *Knight* is in no way affected by anything that was said in *Smith Sligo's* case by the Judges of this Division of the Court. The question raised in the *Culross* case the Judges remarked was a merely possessory one.'

"The pursuer's third argument at first appeared to me to have a better chance of success.

"The cases dealing with jurisdiction *ratione contractus* are neither so clear nor so convincing as those dealing with the other two points, but I feel, looking to the present state of the authorities, that I am reluctantly bound to sustain the plea of 'no jurisdiction.' I might have distinguished between 'the foreign defender' and a defender residing in Scotland but outside this sheriffdom, but I think it unnecessary to labour the point. A 'foreign defender,' it has been well decided, can always be brought into the Supreme Court, or a Sheriff Court for that matter, on the plea of jurisdiction *ratione contractus* after personal service within Scotland in the one case and within the county in the other—See *Wylie* v. *Laye*, July 11, 1834, 12 S. & D. 927; *Sinclair* v. *Smith*, July 17, 1860, 22 D. 1475; *Pirie* v. *Warden*, February 20, 1867, 5 Macph. 497; and *Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984.

"The question whether jurisdiction *ratione contractus* is sufficient without personal service in territory of the Sheriff raises in my mind a far more difficult question. I find that several learned Sheriffs took the view that personal citation was not essential—among others I see Sheriff Mackintosh of Ross-shire (now Lord Kyllachy) in the case of *Mackay* v. *Mackenzie*, Guthrie Select Cases (second series), p. 242, expressed the opinion—although he had decided the case on another ground, and his opinion on this point may therefore be said to be *obiter*. 'It is not necessary to decide,' he says, 'the important and somewhat difficult question whether, apart from domicile, jurisdiction exists *ratione contractus*. It is admitted that the contract sued on was made and fell to be performed within the county, and the Sheriff had an interesting argument upon the question whether, in order to found jurisdiction on this ground, personal citation within the county is essential. If it had been necessary to form an opinion upon that question, the Sheriff would have been inclined to hold, as appears to have been held in other Sheriff Courts, that at all events where property is possessed within the county, and the Court has thus the means of making its decree effectual, there is no necessity for personal citation—See Ersk. i. 2, 20; Voet ad Pandectas, v. i, 73. But, as has been said, it is not necessary to decide this question at present.' Sheriff Gloag of Stirlingshire (now Lord Kincairney), in the case of *Taylor* v. *Shaw Stewart*, December 14, 1881, Guthrie's Select Cases (2nd series), p. 244, expressed a decided opinion that personal service was not necessary. He says, p. 251—'But though personal citation within the territory may be a requisite to operative jurisdiction *ratione contractus* where the defender is domiciled and resident abroad, the question remains—Is it equally essential in a question as to the jurisdiction of a sheriff over a defender resident in Scotland, but not within the territory of that sheriff. The Sheriff is of opinion that it is not equally essential.' Now, though I am much impressed with the opinions of these learned Sheriffs, still I cannot consider them authoritative. On the other hand, in the case of *Bird* v. *Brown*, August 30, 1887, 1 White, 459, and 25 S.L.R. 1 (the last and most important Supreme Court case the Sheriff-Substitute can find on the point), Lord Adam said—'Where the defender in an action in the Sheriff Court does not reside or has no domicile in the county, my understanding of the law and practice is that he must be cited personally within the sheriffdom. It is said here that there has been good service upon the defender in respect of the provisions of the Citation Amendment Act of 1882. It is at least doubtful whether the mode of service introduced by that statute can be held to be equivalent to personal service. But it is unnecessary to determine that point, for something more is required, viz., personal service within the jurisdiction. The Citation Amendment Act does not enlarge the Sheriff's jurisdiction, and I am of opinion, in the present case, that the Sheriff had no jurisdiction to pronounce the judgment appealed against,'

"The case of *Pirie* v. *Warden*, 5 Macph. 497, appears to me to go further than the rubric would suggest, and not to be confined to the case of a 'foreigner' only, for I find the Lord Justice-Clerk (Inglis) remarking at p. 499—'There can I think be no doubt that as regards this Court that would be a perfectly good ground of jurisdiction, and I did not understand Mr Young seriously to dispute that proposition; but then it is made a question whether that is an equally good ground of jurisdiction in the Sheriff Court. Accordingly it falls to be asked in the first place whether, supposing this defender was a Scotsman domiciled in another sheriffdom, the occurrence of the conditions which we have here would give the Sheriff of Aberdeen jurisdiction over him? Now, though there is no direct authority on the point, I

have little doubt that this question must receive an affirmative answer.'

"Dove Wilson, in his Sheriff Court Practice, at p. 72 (4th ed.), says—'If a person undertakes to perform some contract within a sheriffdom he is liable to the jurisdiction of the sheriff, provided he be personally cited within the territory.' This opinion appears to be based on the case of *Bird* v. *Brown*, *supra*, and Professor Dove Wilson mentions in a note on p. 72 that Lord Adam, differing from Sheriff Gloag and reversing Sheriff Muirhead, upheld the doctrine stated in the text, *i.e.*, that personal service is necessary,

"I think I am bound to hold the case of *Bird* v. *Brown* as the latest authority, and deciding the question of jurisdiction *ratione contractus* in the Sheriff Courts. I must therefore sustain the defenders' plea of no jurisdiction, which, I may say, I do as a question which turns not on expediency but on a principle of law. I might here point out that in actions having as their base for jurisdiction *ratione contractus* the case must be one for the enforcement of the contract or arising directly out of its non-fulfilment. Such a plea was not raised in this case, and it is therefore unnecessary for me to go into it. See case of *Logan* v. *Thomson*, 1859, 3 Irv. 323, 31 Jur. 174."

The pursuer appealed to the Sheriff (WILSON), who by interlocutor dated 27th September 1901 refused the appeal and affirmed the interlocutor appealed against.

Note.—"I have found the questions of jurisdiction raised in this case very difficult, and it is with considerable hesitation that I have come to the conclusion that I must affirm the judgment of the Sheriff-Substitute.

"On the question whether the defenders are subject to the jurisdiction of the Court on the ground that as trustees they are heritable proprietors of an estate in Orkney, part of which is let to the pursuer, I think that the decisions are adverse to the pursuer's contentions—neither of the trustees called as defenders in this case being resident within the sheriffdom.

"*Black* v. *Duncan*, 6 S. 261; *Halliday's Executor*, 14 R. 251; *Thomson* v. *Wilson's Trustee*, 22 R. 866.

"On the question whether it is necessary, in order to constitute jurisdiction *ratione contractus* in the present case, that there should have been personal citation of at least one of the two defenders within the Sheriffdom, I think that the Sheriff-Substitute is right in saying that the judgment of Lord Adam in the Justiciary Court case of *Bird* v. *Brown* is in point, and is to the effect that personal citation within the sheriffdom is necessary in the circumstances of this case. In *Bird* v. *Brown* the contract was to be executed in Stirlingshire, and the defender was possessed of heritage within that county, and Lord Adam held that, in order to constitute jurisdiction in the Sheriff-Court at Stirling, there must be personal citation of the defender within the sheriffdom.

"I cannot find any other case in the Supreme Court in which it has been directly decided that, in order to constitute jurisdiction *ratione contractus* in the Sheriff Court, personal citation within the particular sheriffdom is necessary where the defender is a domiciled Scotchman or is possessed of heritage within the sheriffdom.

"There are, however, incidental *dicta* in some of the cases to that effect,

On the other hand, the decision of Sheriff Gloag (now Lord Kincairney) in the Sheriff Court case of *Taylor* v. *Shaw Stewart* is to the contrary effect, and the reasoning and conclusion of the learned Sheriff seem to me to be supported by considerable authority — Erskine's Institutes i., 2, 20; Voetii Commentarius ad Pandectas, Book v., Title i., section 73; Bar's Private International Law, section 424, Gillespie's Translation, 2nd Ed., page 922; Opinion of Sheriff Mackintosh (now Lord Kyllachy) in *Mackay* v. *Mackenzie*, October 13, 1884, Guthrie's Select Cases, 2nd ser., 242.

"In this conflict of opinion, although much impressed by the reasoning of Sheriff Gloag in *Shaw Stewart's* case, I do not feel justified in altering the judgment of the Sheriff-Substitute, supported as it is by the latest reported decision on the point in the case of *Bird* v. *Brown*.

The pursuer appealed to the Court of Session, and argued—The Sheriff had jurisdiction *ratione contractus*. The case of *Bird* v. *Brown*, August 30, 1887, 1 White 459, 25 S.L.R. 1, which was mainly relied on by the Sheriff was not binding on this Court, as it was decided in the Circuit Court of Justiciary, and was also the decision of a single judge. The fact that one of the trustees was resident in England was immaterial so long as the trust-estate was situated within the sheriffdom—*Thomson* v. *Wilson's Trustees*, July 5, 1895, 22 R. 866, 32 S.L.R. 653. Personal service within the sheriffdom was not necessary provided the contract had been made within the sheriffdom and the defender had effects therein—*Taylor* v. *Shaw Stewart*, December 14, 1881, Guthrie's Select Cases, second series, 244 (Opinion of Sheriff Gloag, now Lord Kincairney); *Mackay* v. *Mackenzie*, October 13, 1884, Guthrie's Select Cases, second series, 242 (Opinion of Sheriff Macintosh, now Lord Kyllachy); Erskine's Inst., i., 2, 20; Voetii Com. ad Pandectas, v., 1, 73. The fact that the contract had been made within the sheriffdom and related to heritable property situated within the sheriffdom, combined with the fact that the defenders had effects there on which a decree might be made operative, was sufficient to confer jurisdiction—*Mouat* v. *Lee*, June 6, 1891, 18 R. 876, 28 S.L.R. 695; *Starke's Trustees* v. *Cooper's Trustees*, July 20, 1900, 2 F. 1257, 37 S.L.R. 944.

Argued for the defenders—Personal citation within the sheriffdom was essential to found jurisdiction *ratione contractus* in the circumstances of the present case. Personal service on the defender within the sheriffdom was also necessary even in the case where the defender had heritable property within the sheriffdom—*M'Bey* v.

Knight, November 22, 1879, 7 R. 255, 17 S.L.R. 130; *Commisssioners of Pollockshaws* v. *M'Lean*, November 17, 1899, 2 F. 96, 37 S.L.R. 76; *Bird* v. *Brown*, August 30, 1887, 1 White 459, 25 S.L.R. 1. The case of *Mouat* (cited *supra*) was decided on the construction of a statute and not on common law, and so did not extend the rule of the common law on the point. In the case of *Halliday's Executor* v. *Halliday's Executors*, December 17, 1886, 14 R. 251, 24 S.L.R. 204, confirmation in the Sheriff Court of the deceased's domicile was held not to subject the executors to the jurisdiction of that Court. *Stark's Trustees* (cited *supra*) was also decided on statute. The case of *Culross Special Water Supply District Committee* v. *Smith Sligo's Trustees*, November 6, 1891, 19 R. 58, 29 S.L.R. 73, was a case of possessory remedies, and so the Sheriff's jurisdiction was sustained on that ground. Personal service on the defender within the sheriffdom was held essential in *Pirie* v. *Warden*, February 20, 1867, 5 Macph. 497, 3 S.L.R. 260; *Wylie* v. *Laye*, July 11, 1834, 12 S. 927; see also Erskine's Inst. i., 2, 17 *et seq.*; *Sinclair* v. *Smith*, July 17, 1860, 22 D. 1475.

At advising—

LORD TRAYNER—The pursuer, who was the defenders' tenant on a farm in Orkney, raises this action for payment of certain sums which he alleges are due to him in respect of the defenders' obligations as landlords. The pursuer's tenancy terminated at Martinmas 1899, and there is now no relationship between him and the defenders except the relationship which he alleges of debtor and creditor. The defenders both reside outside the Sheriffdom of Orkney.

The pursuer has convened both the defenders in the Sheriff Court of Orkney, and the defenders have pleaded "no jurisdiction." The Sheriff and Sheriff-Substitute have held that that plea should be sustained. After hearing a full argument, and after consideration of the authorities, I am of opinion that the Sheriffs have rightly decided.

It may be subject for regret that that view is to be sustained, because one can see that the most convenient *forum* for the trial of such a question may be in Orkney, where the lands are situated, and where proof of the different parts of the claim can be most easily obtained. But I am afraid we must go by rule, if there is a rule, without considering whether that rule is a good one or the reverse.

It is quite settled that a sheriff has no jurisdiction over a person simply because that person has heritage in the sheriffdom. Accordingly the defenders are not subject to the jurisdiction objected to on the ground that the farm of which the pursuer was tenant is their property. The ground on which the pursuer relies is that there is jurisdiction *ratione contractus* by reason of a contract between the parties, the obligations of which *hinc vide* fall to be implemented in Orkney. It is said that by reason of that the defenders should answer in the Sheriff Court of Orkney for the claim which the pursuer now makes. I think there is a good deal to be said in favour of that view if the question was an open one, but the weight of authority is to the effect that to create jurisdiction *ratione contractus* there must be personal citation of the defenders within the territory of the judge. There has been no such citation here, and therefore no jurisdiction in the Sheriff Court of Orkney created *ratione contractus*. It was stated as an anomaly that the defenders might have sued Mr Maxwell for rent in the Sheriff Court of Orkney, and it was argued that if the pursuer could be sued there for rent then the defenders on the same principle could be sued there for damages for breach of any obligation imposed on them by the contract of lease. But I think the answer given to that is satisfactory. If Mr Maxwell had still been tenant of this farm he would have been carrying on business in Orkney, and therefore subject to the jurisdiction of the Sheriff. But after he ceased to carry on business as tenant of the defenders' farm and went to reside in another county I think the defenders could not have convened him in Orkney.

I think the appeal should be dismissed and the judgment of the Sheriffs sustained.

LORD MONCREIFF — With considerable reluctance, and not without difficulty, I have come to the same conclusion.

The defenders are proprietors of the farm of Howe in Orkney, and the pursuer was tenant of that farm till Martinmas 1899. At the raising of this action he had ceased to be tenant, and brought various claims against the defenders more or less connected with his tenancy.

The first plea for the defenders is "no jurisdiction." The defenders are resident one in Edinburgh and one in England, and it is admitted that there was no personal service on them in Orkney; and the question is, whether jurisdiction has been founded against them or not. We had a very learned argument, and up to a certain point I have had no difficulty. I am satisfied that the mere possession of heritage within the Sheriff's jurisdiction does not confer jurisdiction in the Sheriff Court. I am equally clear that the mere existence of a contract entered into within the jurisdiction is not enough. The doubt I had was whether these two things combined might not suffice. It certainly would be very reasonable and convenient that they should; that is to say, if it could be held that a contract entered into with reference to heritage belonging to defenders within the sheriffdom conferred jurisdiction. But on considering the whole of the authorities I cannot find sufficient warrant for that. I do not think that any of the authorities go so far. What at one time struck me as a possible solution of the question was this—that if the defenders could sue the pursuer in the Sheriff Court of Orkney for rent or enforcement of the stipulations of the lease in their favour, the pursuer must necessarily have a corresponding right to sue the

defenders there. But probably a sufficient answer to that is, that by the time the action was raised the pursuer's connection with the farm had ceased, and all that remained was a claim for damages for breach of contract on the part of the defenders. To enforce such a claim he must, I am afraid, follow the usual rule of seeking the *forum rei*.

On one point I have no doubt, and think we should leave none, namely, that the mere fact of a contract being entered into within the sheriffdom will not confer jurisdiction without personal service within the sheriffdom. The question is not merely one as to sufficiency of citation in such a case; personal citation within the county is essential to the constitution of jurisdiction.

LORD JUSTICE-CLERK — I only wish to make one remark which is this — that though the rules of procedure which have been established may result in hardship sometimes, as in the case of this pursuer, these rules of procedure are fixed for the greatest convenience of the Courts and of the citizen, and we cannot depart from them on considerations of convenience in particular cases.

If at any time, through change of circumstances or otherwise, the question arises whether such rules should be modified, that is a question for the legislature to consider. In the meantime the law is as your Lordships have said, and we must adhere to it.

LORD YOUNG was absent.

The Court dismissed the appeal, sustained the first plea-in-law for the defenders, and dismissed the action, and decerned.

Counsel for the Pursuer and Appellant—Dundas, K.C.—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Respondents—Mackenzie, K.C.—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, January 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BOSWELL *v.* NORTH BRITISH RAILWAY COMPANY.

Contract—Railway—Breach of Contract—Damages—Remote and Consequential—Reparation—Invasion of Rights—Railway Company allowing Officer of Law, in Execution of Duty but without Warrant, to examine Parcel, with result of Prosecution.

Miss B. delivered to a railway company a box containing a salmon caught in the river Tweed, and addressed to a consignee in Edinburgh. While the box was in the custody of the servants of the Railway Company they permitted an officer of the law to open it and to take possession of the salmon. The officer had not obtained the warrant of a magistrate before so acting. Subsequently Miss B. was charged in the Sheriff Court at the instance of the Procurator-Fiscal with having had in her possession a salmon known by her to have been illegally caught in the Tweed, contrary to the Tweed Fisheries Amendment Act 1859. The charge was found not proven.

In an action by Miss B. against the Railway Company concluding for damages in respect of the expense to which she was put in defending herself from this charge and the injury to her feelings owing to the prosecution, *held* (*aff.* judgment of Lord Kincairney) that the action was irrelevant, and that the defenders were entitled to absolvitor, in respect (1) that the Railway Company being entitled to assume that the officer of the law was proceeding in execution of his duty, committed no wrong or breach of contract in permitting the officer of the law to seize the salmon, and (2) that the act of the Railway Company in permitting the officer to open the box and to seize the salmon was not the direct cause of the expense or injury to the pursuer's feelings resulting from the prosecution.

Observed (*per* Lord Justice-Clerk) that the ordinary citizen or a railway company is not committing a wrong to anyone in submitting to what the officers of the law ask to be allowed to do when they come saying that they are acting in the execution of their duty.

Miss Boswell, 56 Rosetta Road, Peebles, on October 19, 1900, delivered to the North British Railway Company at their railway station at Peebles a tin box containing articles of clothing and a salmon caught in the Tweed, addressed to a consignee in Edinburgh.

While the tin box was in the custody of the servants of the Railway Company at the Waverley Station, it was taken possession of and opened by an officer of the Forth Fishery District. Subsequently, on the same day, the said fishery officer took possession of the salmon, which was never delivered to the consignee.

On November 24, 1900, Miss Boswell was charged at the instance of the Procurator-Fiscal of the County of Peebles with having on October 19, 1900, had in her possession at her dwelling-house one salmon (being the salmon taken possession of by the said officer) known by her to have been illegally taken or caught in the Tweed, contrary to the Tweed Fisheries Amendment Act 1859. After evidence had been led the Sheriff-Substitute found the charge not proven.

Miss Boswell brought an action against the North British Railway Company concluding for payment of the sum of £200 sterling as reparation to the pursuer in respect of (1) the expense to which she was put in defending herself from said charge, and (2) injury to her feelings owing to the said prosecution.